IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 13, 2009

STATE OF TENNESSEE v. CLIFFORD ERIC BURGESS

Direct Appeal from the Circuit Court for Montgomery County
No. 40500792 Michael R. Jones, II, Judge

No. M2008-01370-CCA-R3-CD -Filed August 10, 2009

The defendant, Clifford Eric Burgess, was convicted by a Montgomery County jury of five counts of rape of a child, a Class A felony, and was sentenced by the trial court to an effective twenty-five-year sentence in the Department of Correction. He raises six issues on appeal: (1) whether the indictment was insufficient for failing to provide specific dates of the offenses; (2) whether the trial court erred in denying the defendant's motion to suppress his statement to police; (3) whether the trial court erred in admitting into evidence a photograph of the shirtless defendant; (4) whether the evidence was sufficient to sustain the convictions; (5) whether the trial court imposed an excessive sentence; and (6) whether the trial court erred in denying the defendant's petition for writ of error coram nobis based on newly discovered evidence of the defendant's mental illness. Following our review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

Roger Eric Nell, District Public Defender; Crystal L. Myers (on appeal) and Rebecca F. Stevens (at trial), Assistant District Public Defenders, for the appellant, Clifford Eric Burgess.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Helen Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On May 14, 2002, the defendant's girlfriend, Pamela Newton, discovered her nine-year-old niece, S.G.,[1] performing oral sex on the twenty-three-year-old defendant in the kitchen of her home. Newton called the police and the defendant fled from the home. Approximately one week later, Newton accompanied the defendant to the police department, where he gave a statement in which he admitted that the victim had performed oral sex on him eight different times, but claimed that she had been the aggressor each time and had performed the sex acts against his will. The defendant was subsequently indicted on eight counts of rape of a child based on the incidents involving S.G. and one count of statutory rape based on an incident involving S.G.'s seventeen-year-old sister, M.M.

Suppression Hearing

The defendant filed a motion in limine to suppress his statement to police. At the hearing on that motion, the trial court first watched the videotape of the defendant's May 21, 2002, interview before hearing testimony from the interviewing officer, Detective John Nichols of the Clarksville Police Department, about the circumstances that led to the defendant's statement. Detective Nichols testified that Newton, who had given a statement to police on May 14 when she reported the incident she had witnessed, telephoned on May 20, saying that she wanted to change her statement. He said he asked her to bring the defendant, whom he had not yet interviewed, with her and arranged a time for all of them to meet. He stated that Newton brought the victim's sister, M.M., to the police department to give a statement on May 20 and the following day, May 21, brought in the defendant. Detective Nichols testified that he read the defendant his rights and obtained his waiver before taking his statement. He identified the waiver of rights form and the defendant's handwritten statement, which were admitted as exhibits.

At the conclusion of the hearing, the trial court overruled the defendant's motion to suppress the statement, finding, among other things, that Detective Nichols had honored the only promise he had made to the defendant, which was that he would be free to go home after giving the statement. The court further found that the detective's having told the defendant that the statement would be used to obtain help for the victim did not render the statement involuntary:

> Investigators are not required to tell the truth absolutely to the [d]efendant to make a statement, voluntary. All of what I see on the video would indicate to me that this is a totally voluntary statement on behalf of [the defendant]. After filling out the information sheet, Detective Nichols said words to the effect, tell me what I know and what [Newton] told me, which was an indication to me that what he knew about the statement came from Pam Newton and we have got to get help for this girl. With your statement, we will get her help, tell me what I already know. That is not to the extent as in these other cases on making any statement involuntary.

[1] It is the policy of this court to refer to minor victims of sexual assault by their initials only.

Trial

The State's first witness at the January 24-25, 2006, trial was the victim, who testified that she was born on August 9, 1992, and was currently thirteen years old. She said that from January to May 2002, when she was nine years old, she lived at 32 West Belair with her mother, brothers, sister, and grandmother. Her aunt, Pamela Newton, lived next door with the defendant and the defendant's two- or three-year-old son, and she often visited at her aunt's home. The last time she saw the defendant was when he fled from Newton's home on the day that her aunt walked into the kitchen and found her performing oral sex on him. The victim testified that she and the defendant were together in the kitchen and she was in the process of putting away her fork when the defendant asked her to perform oral sex. She said she did what he asked, taking his penis into her mouth and sucking on it, because she was scared.

The victim testified that the kitchen incident was not the first time that she had performed oral sex on the defendant. She recalled a total of six times: "two in the garage, one walking, one bicycling, one at a dead end and one in the kitchen." She said that each time the defendant asked her to do it and she complied because she was afraid. She never initiated the contact, never wanted to do it, and never in any way attacked the defendant. The victim stated that she did not remember how frequently the contacts occurred, but agreed when the prosecutor asked whether they were "just seldom." When asked if she recalled what time of year it was, she replied, "All I remember it was sometime between winter." After having her memory refreshed by her statement to police, the victim also recalled that another episode of oral intercourse with the defendant occurred in his bedroom. She could not, however, recall anything more specific about the incident.

The victim testified that before he was caught by Newton, the defendant told her not to tell anyone about the incidents. After he was caught, he threatened to kill her and her family. On cross-examination, the victim denied having heard in 2002 about any sexual encounter between her older sister, M.M., and the defendant. She said she and her sister never had any conversations about the defendant and never discussed blackmailing him.

M.M., who was twenty-one years old at the time of trial, testified that the defendant physically forced her to perform oral sex on him when she was seventeen. She said the incident occurred in August or September of 2001 during a time when her mother was gone to the store. She stated that the defendant came over to her house, entered her bedroom, unzipped his pants, pulled out his penis, and forced her head down onto his penis so that she was unable to move. She said she did not tell anyone about the incident at the time.

M.M. testified that she learned about the kitchen incident between the victim and the defendant at about 7:00 or 8:00 p.m. on May 14, 2002, when Newton awakened her and her brother by "yelling and screaming" that they had to get up and get out of there. She stated that Newton took them that night to their grandmother's house in Nashville. Sometime later in the week, Newton picked M.M. up from school and took her to the police department to give a statement. Because

Newton threatened to kill her and her sister, she did not tell the police the truth but instead provided a fabricated story that Newton had instructed her to tell.

On cross-examination, M.M. testified that she told the police she had awakened the defendant by crawling into his bed and performing oral sex on him and that she had done the same thing with her mother's boyfriend. She also acknowledged having told the police that she believed the victim, who had overheard her talking with the defendant about how wrong her behavior had been, was attempting to blackmail the defendant. On redirect examination, M.M. testified that she had not, in fact, ever seen the victim behave inappropriately or heard her discuss blackmailing the defendant.

Detective John Nichols testified that M.M.'s name did not come up during the course of his investigation until Newton brought her into the police department on May 20, 2002, where she gave her statement in the presence of Newton. He said that because her account was so different from Newton's May 14 statement, he was suspicious and believed that Newton had "brought [M.M.] in to influence and change the investigation." He stated that he had been unable to locate the defendant at that point, but Newton told him that she would find him and bring him in to give a statement on May 21.

Detective Nichols testified that the defendant admitted in his statement that oral intercourse with the victim had occurred but claimed that it had happened against his will: "[The defendant's] theory, or his explanation[,] was that this nine-year-old girl was fast enough, strong enough to pull his pants down, pull his penis out and suck his penis." He said the defendant told him the victim had done it eight times, "but she had attempted some 25 times." The defendant was very specific as to the locations but was uncertain about the dates of the incidents previous to the May 14 incident, other than that they had occurred from January to May 2002.

Both the videotape of the interview and the written statement were admitted as exhibits and published to the jury. The statement reads in pertinent part:

> The night Pam saw [the victim] trying to push her self [sic] on me, [the victim] was told on several occasions to go home and that she had school in the morning by Pam and I [sic]. I told [the victim] to go home at least 5 times because I knew her reason for trying to stay. That night [the victim] at two different instances grab[b]ed me in the testicals [sic] and practical[l]y fought me so that she could try to perform oral sex on me. I tried to pry [the victim's] hand off of my testicals [sic] with out [sic] her hurting me, but was unable to do so before she succeeded in getting my penis in her mouth. I became so dis[g]usted with her that I shoved her off of me pushing her backward towards the wall. When Pam came to the door I did not know how much of what she was doing that Pam had witnessed. This was not the first time [the victim] forced her self [sic] on me. This happen[e]d on at least 6 or more different times. Once when I was in the shower she knocked on the door and said she had to pee. I told her she had to wait. She entered the bathroom anyway pulling the shower curt[a]in back[,] grabbed my testicals [sic] and began to perform oral sex on

> me. I[t] happen[e]d twice in the garage on two different oc[c]asions, once when she asked me to help her find an umbr[e]lla, and once when she asked me to help her get her bike out for her. It also happen[e]d one night that Derick, [the victim] and I had taken the dog's [sic] for a walk, [the victim] had complained of her legs hurting and asked me to carry her. I gave her a pig[gy]-back ride. Derick and I raced toward the stop sign and with Derick leading [the victim] started rubbing on my chest and tr[y]ing to t[o]uch me funny. I pushed [the victim] down and she ran off down another street. This was after dark and concerned with her safety [I] went after her. I followed her in an empty house drive way and behind the house she had her pants down. I tried to explain to [the victim] that what she was doing was wrong. She started crying and when I told her to pull up her pants she hugged me and then grab[b]ed my testicals [sic] and began to perform oral sex.

Detective Nichols testified that soon after he began his investigation, and before M.M. and the defendant had made their statements, Newton brought him a wanted poster of the defendant that she had placed in the neighborhood. He said that she was still upset about the incident she had witnessed and made no attempts to change her statement at that time. He identified the photograph from the poster and stated that it accurately depicted the more muscular appearance that the defendant presented at the time of the incidents. He said that the defendant informed him at the time of his statement that he was 6 feet tall and weighed 160 pounds. Detective Nichols also identified photographs of the victim, which he said were still frames taken from the videotape of her May 17, 2002, interview at the child advocacy center.

Finally, Detective Nichols acknowledged that he had referred several times in his interview with the defendant to the victim's aggressive behavior. He explained that it was merely a tactic he employed to get the defendant to open up about the incidents and said that he had no evidence that made him believe it was true. He testified:

> Ms. Newton made a statement in the beginning explaining things that she knew. She later came in wanting to change her entire statement. She basically told the same thing except she informed me that it was all because of [the victim] becoming aggressive. No other place in any other had I heard anything about her being aggressive.

The defendant elected not to testify and rested his case without presenting any proof. The trial court dismissed counts three, four, and eight of the indictment, leaving the jury to deliberate on count one, the incident in the kitchen; count two, the incident in the defendant's bedroom; count five, the incident in the garage; count six, the incident while out walking; count seven, the second incident in the garage; and count nine, the count charging the defendant with the statutory rape of M.M. Following deliberations, the jury found the defendant guilty of all five counts of rape of a child but not guilty of statutory rape.

Sentencing Hearing

At the sentencing hearing, the State introduced the defendant's presentence report, which reflected that the twenty-seven-year-old defendant reported he had a juvenile record consisting of an arrest at age sixteen in New Jersey for car theft, for which he had been sentenced to three years' detention. The defendant, in turn, introduced a mitigation report prepared by Tracey Voight, a mitigation specialist and social worker in the district public defender's office. The mitigation report stated, among other things, that the defendant had reported that his mother suffered from paranoid schizophrenia and behaved violently and erratically toward him, his siblings, and his father; that his mother had disappeared from his life following his parents' divorce; and that he had become homeless at thirteen and been forced to drop out of school at the age of sixteen. Voight testified at the hearing that the jail's medical notes reflected that the jail's attending psychiatrist had prescribed schizophrenia medication for the defendant, who had reported hearing voices and been seen eating his stool. On cross-examination, she acknowledged that the psychiatrist's notation of "paranoid schizophrenia" did not indicate whether he had diagnosed the defendant with that illness or that it was simply a possibility. She further acknowledged that the defendant had exhibited no signs of mental illness before he was convicted of the offenses and had reported that he had no history of mental illness to the investigating officer who prepared his presentence report.

The trial court found two mitigating factors applicable: that the defendant's criminal conduct neither caused nor threatened serious bodily injury and the fact that the defendant had had a difficult childhood, as described in his mitigation report. See Tenn. Code Ann. § 40-35-113(1), (13) (Supp. 2002). The court concluded, however, that these factors were entitled to very little weight, noting that the report of the defendant's childhood difficulties was "[t]o a certain degree . . . offset by [the defendant's] own statements in the presentence report," indicating that he enjoyed a good relationship with his family. The trial court found that enhancement factor (21), the defendant was adjudicated to have committed a delinquent act as a juvenile that would constitute a felony if committed by an adult, was applicable to all the offenses and that enhancement factor (2), the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, was applicable to the May 14, 2002, offense, based on the rapes of the victim that he had committed prior to that date. See Tenn. Code Ann. § 40-35-114(2), (21) (Supp. 2002). Applying great weight to the enhancement factor of the defendant's previous criminal behavior, the trial court sentenced the defendant to twenty-five years for count one, the May 14, 2002, offense, which was five years beyond the presumptive midpoint sentence of twenty years. The trial court sentenced the defendant to the minimum sentence of fifteen years for the four remaining counts of the indictment and ordered that the sentences be served concurrently, for an effective sentence of twenty-five years at 100 percent in the Department of Correction.

ANALYSIS

I. Sufficiency of the Indictment

The defendant contends that the indictment was insufficient to put him on adequate notice of the charges against him or to properly protect him from double jeopardy because it failed to list the specific dates of the alleged offenses. An indictment or presentment must inform the accused of "the nature and cause of the accusation." U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In addition, Tennessee Code Annotated section 40-13-202 requires that an indictment "must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in a manner so as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment."

An indictment that achieves its "overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements." State v. Hammonds, 30 S.W.3d 294, 300 (Tenn. 2000). Our supreme court has held that an indictment is sufficient to satisfy notice requirements if it "contains allegations that (1) enable the accused to know the accusation to which answer is required; (2) furnish the trial court an adequate basis for entry of a proper judgment; and (3) protect the accused from a subsequent prosecution for the same offense." Id. at 299 (citing State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997)).

We agree with the State that the indictment contained sufficient information to put the defendant on notice of the charges and to protect him against being twice placed in jeopardy for the same offense. The indictment charged the defendant with eight counts of child rape. Count one specified that the offense occurred on May 14, 2002, while counts two through eight alleged that the offenses occurred "between January 1, 2002 and May 13, 2002." Each offense, however, was narrowed as to the type of intercourse and the location, such as "fellatio while in the defendant's bedroom," "fellatio while in the garage looking for an umbrella," "fellatio while outside in the yard walking the dog," and "fellatio while in the garage looking for victim's bicycle[.]"

The defendant asserts that the lack of specific dates prevented him from supplying alibis for the offenses. However, an indictment is not required to state the exact date an offense is alleged to have occurred unless the date of the offense is a material ingredient to the offense. See Tenn. Code. Ann. § 40-13-207; State v. Byrd, 820 S.W.2d 739, 740 (Tenn. 1991). "[T]he State need allege only that the offense was committed prior to the finding of the indictment or presentment." Byrd, 820 S.W.2d at 740. Moreover, as the trial court noted when overruling the motion for new trial, the defendant could have requested a bill of particulars if he needed further clarification. We conclude, therefore, that the defendant is not entitled to relief on the basis of this claim.

II. Denial of Motion to Suppress Statement

The defendant cites State v. Phillips, 30 S.W.3d 372 (Tenn. Crim. App. 2000), among other cases, to argue that his statement was rendered involuntary by the interviewing detective's

misrepresentations as to the aggressiveness of the victim and the fact that the statement would be used to obtain treatment for her. The State argues that the evidence does not preponderate against the trial court's findings that the statement was knowing and voluntary. We agree with the State.

When this court reviews a trial court's ruling on a motion to suppress evidence, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The party prevailing at the suppression hearing is afforded the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998). The findings of a trial court in a suppression hearing are upheld unless the evidence preponderates against those findings. See id. However, the application of the law to the facts found by the trial court is a question of law and is reviewed *de novo*. See State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The corresponding provision of the Tennessee Constitution states "[t]hat in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const art. I, § 9. Our supreme court has concluded that "the test of voluntariness for confessions under Article 1, § 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment." State v. Crump, 834 S.W.2d 265, 268 (Tenn. 1992).

Confessions that are involuntary are inadmissible. Phillips, 30 S.W.3d at 377 (citing Rogers v. Richmond, 365 U.S. 534, 540, 81 S. Ct. 735, 739 (1961)). "Coercive police activity is a necessary prerequisite in order to find a confession involuntary." Id. (citing State v. Brimmer, 876 S.W.2d 75, 79 (Tenn. 1994)). In order to be considered voluntary, a statement "'must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'" State v. Kelly, 603 S.W.2d 726, 727 (Tenn. 1980) (quoting Bram v. United States, 168 U.S. 532, 542-43, 18 S. Ct. 183, 187 (1897)). Courts look to the totality of the circumstances to determine whether a confession is voluntary. State v. Smith, 933 S.W.2d 450, 455 (Tenn. 1996).

It was undisputed that the defendant voluntarily came into the police department to give his statement. The videotape of the interview shows that he was accompanied in the interview room by Newton. Although he was not in custody, Detective Nichols began by advising him of his Miranda rights and obtaining his signed waiver. He told the defendant that he was not making him any promises other than that he was not going to take him to jail that day. He said that they "kind of needed to get on the same page of music, so to speak, so let me tell you what I know, then y'all write your statements." He then related Newton's version of the events, namely, that the victim had acted aggressively in the kitchen, as she had in the past, by pulling the defendant's pants down, grabbing his penis, and putting it in her mouth. He said, "We have cases where young girls are very aggressive. We can't get them help until we have statements saying just how aggressive they are." He also referred to six as the number of incidents of oral intercourse alleged by the victim and asked

the defendant to include in his statement all the incidents that had occurred. He then took Newton with him to another room to write her statement, leaving the defendant alone to write his statement. However, he returned to briefly check on the defendant's process from time to time. Throughout the process, he remained cordial, courteous, and non-accusatory in his manner.

The interview process in Phillips, cited by the defendant, was markedly different. The defendant in Phillips initially maintained his innocence until worn down by the investigators' numerous promises, inducements, and misrepresentations. Phillips, 30 S.W.3d at 377. This court affirmed the trial court's finding that the statement was rendered involuntary by the coercive tactics and promises of leniency employed by the police investigators in their efforts to obtain the statement:

> A review of the 36-page transcript of the interrogation in the case at bar reveals (1) misrepresentations by an investigator, (2) numerous steadfast denials by the defendant, (3) statements that law enforcement officials would be involved if the defendant did not confess, and (4) promises of treatment for the defendant and his stepdaughter only if he fully confessed. The promises and inducements were made repeatedly prior to defendant's incriminatory statements. The actions of the interrogators were much more coercive than those found in [State v.] Smith, [933 S.W.2d 450 (Tenn. 1996)] and, unlike Smith, crossed the line.

Id.

Here, by contrast, the defendant came in to speak to Detective Nichols because he wanted to give a statement. He exhibited no signs of mental confusion or impairment, appeared willing and eager to provide his version of the events, and even volunteered information about additional incidents. Detective Nichols employed the tactic of exhibiting a non-judgmental, non-confrontational attitude in the face of the defendant's claims in an obvious effort to put the defendant at ease and obtain as much information from him as possible, but he made the defendant no promises of leniency or treatment in exchange for the statement. We cannot conclude that his mention of being unable to get aggressive young girls help without having a statement detailing their aggressiveness constituted a threat or promise that overbore the defendant's free will and rendered his statement involuntary. In sum, the record amply supports the trial court's findings that the defendant's statement was knowing and voluntary. Accordingly, we affirm the denial of the defendant's motion to suppress the statement.

III. Admission of Photograph

The defendant contends that the trial court erred by admitting into evidence the photograph of him without his shirt, arguing that its probative value was substantially outweighed by the danger of unfair prejudice. Specifically, he asserts that "the prejudice is that the jury will see the photograph and apply an element of physical violence that was not charged in the indictment." The State argues that the trial court acted within its discretion in admitting the photograph, which countered the

defendant's claim that he had been unable to stop the aggressive victim from performing oral sex on him.

The admissibility of photographs generally lies within the sound discretion of the trial court and will not be overturned on appeal absent a showing that the trial court abused its discretion. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). "Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases." State v. Morris, 24 S.W.3d 788, 810 (Tenn. 2000). In determining whether a photograph is admissible, the trial court must first determine whether it is relevant to a matter at issue in the case. See Tenn. R. Evid. 401; State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998); Banks, 564 S.W.2d at 949. The court must next consider whether the probative value of the photograph is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Tenn. R. Evid. 403.

We agree with the State that the photograph was relevant to show the defendant's more muscular appearance at the time of the incidents and that its probative value outweighed any prejudicial effect. Detective Nichols testified that the photograph accurately reflected the defendant's body build at the time of the incidents. In his statement, the defendant essentially claimed that he had been physically unable to prevent the nine-year-old victim from performing oral sex on him, which made his physical size in relation to the victim's a relevant matter for the jury to consider. We note that the photograph merely shows the defendant standing shirtless with his arms crossed over his chest, and not in a "body-building" stance, as suggested by defense counsel at trial. We conclude, therefore, that the trial court did not abuse its discretion in admitting the photograph into evidence.

IV. Sufficiency of the Evidence

The defendant contends that the evidence was insufficient to sustain his convictions, arguing that the victim's lack of specificity as to the details and dates of the alleged crimes should have prevented a rational trier of fact from concluding that the offenses occurred beyond a reasonable doubt. He further argues that his confession should not be used "to corroborate the deficiencies in [the victim's] testimony" because he confessed to the incidents only at the urging of the police officer, who continually reminded him to include in his statement all of the incidents alleged by the victim. The State argues that the evidence was sufficient to sustain the convictions, and we agree.

When the sufficiency of the convicting evidence is challenged, the relevant question of the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt."); State v. Evans, 838 S.W.2d 185, 190-92 (Tenn. 1992); State v. Anderson, 835 S.W.2d 600, 604 (Tenn. Crim. App. 1992). All questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See

State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our supreme court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 219 Tenn. 4, 11, 405 S.W.2d 768, 771 (1966) (citing Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963)).

A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Rape of a child was defined at the time of the offenses as the "unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-522(a) (1997). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's . . . body." Id. § 39-13-501(7).

The victim described the May 14 incident in detail, testifying that when she went into her aunt's kitchen to put away her fork, the defendant asked her for oral sex. She stated that she complied by sucking on his penis because she was frightened. She then said that she had performed oral sex on the defendant a total of six times, testifying that in addition to the kitchen incident, it had happened twice in the garage, once while walking, once while bicycling, and once at a dead end. Upon having her memory refreshed by her statement to police, she also recalled that she had once performed oral sex on the defendant in his bedroom. She said that she had never wanted to perform oral sex on the defendant and had never assaulted him.

In his statement, the defendant admitted that the victim had performed oral sex on him a total of eight times from January 2002 until May 14, 2002, which included the May 14 kitchen incident, once while he was helping her get her bicycle in the garage, once while he was helping her find her umbrella in the garage, and once while they were walking. As we have previously discussed, we disagree with the defendant's contention that his statement should be discounted as involuntary. By convicting the defendant of the five counts of rape of a child as elected by the State and charged by the trial court, the jury obviously disregarded the defendant's claims that he had been unable to resist

the nine-year-old victim's sexual advances toward him. We conclude, therefore, that the evidence was sufficient to sustain the defendant's five convictions for rape of a child.

V. Sentencing

The defendant next contends that the trial court imposed an excessive sentence in count one by erroneously applying the enhancement factor of his previous history of criminal behavior, not according sufficient weight to the two mitigation factors it found applicable, and not applying as an additional factor in mitigation his severe mental illness. He argues that the trial court's application of the enhancement factor of his history of criminal behavior "violates the Sixth Amendment because the jury did not make a specific finding that the multiple convictions were prior criminal history." Citing State v. Blouvett, 904 S.W.2d 111, 113 (Tenn. 1995), he further argues that the multiple convictions should not be considered prior criminal history because they were all charged in the same indictment. The State argues that there is no plain error in the trial court's sentencing determinations because the defendant admitted to the prior criminal behavior in his statement to police.

The defendant, whose offenses were committed in 2002, was sentenced under the prior law, which provided for a "presumptive"sentence that started in the midpoint of the range for his Class A felonies. See Tenn. Code Ann. § 40-35-210(c), (d) (2003). The trial court was to enhance the sentence as appropriate based on any enhancement factors it found applicable and then reduce the sentence as appropriate based on any applicable mitigating factors. See Tenn. Code Ann. § 40-35-210(d), (e) (2003). In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), however, the United States Supreme Court held that a fact other than that of a prior conviction may not be used to enhance a defendant's sentence beyond the prescribed statutory maximum unless proven to a jury beyond a reasonable doubt or admitted by the defendant. Id. at 301, 124 S. Ct. at 2536; see also Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S. Ct. 2348, 2361 (2000). "[T]he 'statutory maximum' for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at 303, 124 S. Ct. at 2537 (emphasis omitted).

Because the defendant failed to raise any Blakely issues at either his February 17, 2007, sentencing hearing or in his motion for new trial, we consider his claim that the trial court erroneously applied the enhancement factor of his previous criminal behavior for plain error only. See State v. Gomez, 239 S.W.3d 733, 737 (Tenn. 2007); State v. Montreal Lyons, No. W2006-02445-CCA-R3-CD, 2008 WL 2699657, at *6 (Tenn. Crim. App. July 9, 2008), perm. to appeal denied (Tenn. Jan. 20, 2009). "When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. Crim. P. 52(b). In order for us to find plain error,

> "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the

> accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice."

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). The presence of all five factors must be established by the record before we will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one factor cannot be established. Id. at 283.

The prerequisites for a finding of plain error are not satisfied in this case, as a clear and unequivocal rule of law was not breached and no substantial right of the defendant was adversely affected. Although the defendant's admission in his statement to the police that he had oral intercourse with the victim prior to the May 14, 2002, incident does not constitute the type of admission sufficient to satisfy Blakely, see State v. Eric R. Hinton, No. E2007-00657-CCA-R3-CD, 2008 WL 5206434, at *11 (Tenn. Crim. App. Dec. 15, 2008) (citations omitted), perm. to appeal denied (Tenn. May 4, 2009), the fact that the previous rapes occurred was reflected in the jury's verdicts finding him guilty of counts two, five, six, and seven of the indictment. The defendant cites Blouvett to argue that those convictions should not be considered prior criminal history because they were charged in the same indictment. That case, however, is inapposite to the case at bar, as it dealt not with enhancement factors but instead with the use of prior convictions to determine a defendant's offender classification. 904 S.W.2d at 113; see also State v. Dellinger, 79 S.W.3d 458, 506 n.4 (Tenn. 2002) ("The holding in Blouvett . . . is limited to the specific statutes referenced in that opinion for sentencing felony offenders under the Tennessee Criminal Sentencing Reform Act of 1989."); Ricky G. Aaron v. State, No. M2006-01983-CCA-R3-PC, 2008 WL 203394, at *12 (Tenn. Crim. App. Jan. 22, 2008), perm. to appeal denied (Tenn. June 23, 2008) ("If [the legislature] had intended to restrict the use of prior convictions as enhancement factors to those 'occurring prior to the commission of the offense for which the defendant is being sentenced,' the legislature could simply have used the words 'prior conviction.' The use of different language suggests that a different construction is appropriate.").

We further conclude that there was no error in the trial court's failure to apply the defendant's alleged mental illness as a mitigating factor or in the weight it assigned to the mitigating factors it found applicable. As the trial court noted at sentencing, there was no evidence that the defendant was suffering from schizophrenia at the time of the offenses or that it in any way reduced his culpability for the offenses. Furthermore, the defendant's self-reported childhood difficulties in his mitigation report was partially offset by his presentence report statements that he had a good relationship with his family and believed they were supportive of him.

VI. Denial of Petition for Writ of Error Coram Nobis

Finally, the defendant contends that the trial court erred by denying his petition for writ of error coram nobis. On January 24, 2008, the defendant filed a petition for writ of error coram nobis,

alleging that his mental illness constituted newly discovered evidence that would have altered the outcome of the trial, in that it would have raised concerns about his mental capacity and susceptibility to suggestion during the police interview. The trial court denied the motion, finding that even if the defendant had been diagnosed with paranoid schizophrenia following his convictions, there was no evidence that he was suffering from the disease at the time he gave his statement to police.

A writ of error coram nobis is an extraordinary remedy by which the court may provide relief from a judgment under only narrow and limited circumstances. State v. Mixon, 983 S.W.2d 661, 666 (Tenn. 1999). Tennessee Code Annotated section 40-26-105 provides this remedy to criminal defendants:

> Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial. The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause.

Tenn. Code Ann. § 40-26-105 (2006). The decision to grant or deny a petition for writ of error coram nobis based on newly discovered evidence lies within the sound discretion of the trial court. See id.; State v. Hart, 911 S.W.2d 371, 375 (Tenn. Crim. App. 1995).

We find no abuse of discretion in the trial court's denial of the petition. As the State points out, the defendant reported to the investigating officer who prepared his presentence report that he had no history of mental illness, and there was no proof that any of his alleged mental problems surfaced until after he had been convicted and sentenced for the offenses.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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ALAN E. GLENN, JUDGE